



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 12, 1996

Mr. Donald G. Vandiver
First Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR96-0322

Dear Mr. Vandiver:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37621.

The City of Lubbock (the "city") received a request from an individual seeking "all information concerning [his] performance on the police officer video assessment test." More specifically, the requestor asks for his test results, explanations for his overall scores, his scores on individual scenes, and explanations for why he received particular scores. You submitted responsive information, specifically three rater tracking forms, to this office for review. You state in your letter that "the City of Lubbock hereby declines to submit reasons as to why such information should or should not be released," but you also note that "a third party's proprietary interest may be involved."¹

Pursuant to section 552.305 of the Government Code, we notified the party whose proprietary interest is implicated by this request. We received a response from the president of the B-PAD Group ("B-PAD"), the company that created the test administered to the requestor. B-PAD claims that the rater tracking forms and B-PAD scoring manual are excepted from disclosure under section 552.110 as trade secrets. The

¹You reference the city's "Limited Use Agreement" with the B-PAD Group ("B-PAD"). By this agreement B-PAD purports to restrict access to the materials it furnishes to the city. B-PAD points to the contract as a measure it has taken to prevent competitors from discovering its trade secrets. However, a governmental body cannot limit access to public information in its possession by entering into a contract that prohibits release of that information. Open Records Decision No. 514 (1988).

city did not submit the scoring manual to us with its request for a decision. Therefore, we do not rule here on the disclosure of the manual.²

Section 552.110 protects the property interests of private persons by excepting trade secrets from required public disclosure.³ The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.⁴

²Of course, the requestor may make a separate written request to the city for the scoring manual.

³Section 552.110 also excepts commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Open Records Decision No. 639 (1996). However, B-PAD has not claimed that this portion of the exception applies to the requested information. Thus, we do not address it.

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

We do not believe that the rater tracking forms constitute the type of information that the trade secret prong of section 552.110 protects from disclosure. The rater tracking forms, standing alone, do not appear to fit within the Restatement definition of a trade secret. RESTATEMENT OF TORTS § 757 cmt. b (1939). Therefore, the forms are not excepted from required public disclosure by section 552.110. However, the forms are copyrighted material, and any copying of the forms must be consistent with federal copyright law. *See* Attorney General Opinion JM-672 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records). If the requestor wishes to make copies of the forms, he must do so unassisted by the city. In making copies, the requestor assumes the duty of compliance with copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Whether or not the requestor is entitled to copy the forms, he is entitled to inspect them under the Open Records Act. Open Records Decision No. 180 (1977).⁵

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and is not a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 37621

Enclosures: Submitted documents

(Footnote continued)

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

⁵You also submitted to this office a copy of the test instructions presented to the test-taker in written form prior to the administration of the test. Neither the city nor B-PAD objects to disclosure of these instructions. Thus, subject to the discussion of copyrighted material above, the city must release this information to the requestor.

cc: Mr. Randall D. Burrows
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Fort Hood, Texas 76544
(w/o enclosures)